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JAMES H. McKENNEY,
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Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 24.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Appellant,

vs.

THE AMERICAN TRADING COMPANY.

REPLY TO BRIEF OF APPELLEE.

Touching the effect of the Deputy Collector's act, which we rely on as excusing performance of the contract upon exact time, the Appellee states certain positions and relies on some cases which seem to us to require further notice.

1. The curious proposition is advanced that English cases have no application, because of constitutional limitations in this country against impairment of the obligation of contracts. Appellee says it is well settled that no law could be passed by *Congress*, or by any legislature, impairing contracts. We may note in passing that so far as Congress is concerned this statement is by no means free from doubt. But the doctrine we rely upon and the cases supporting it do not rest upon any legislative power to violate the obligation of contracts, but upon the proposition that all contracts are understood to be made subject to the ordinary lawful powers of government. That the performance of a contract to traffic with an enemy is excused by a declaration of war, and that an embargo excuses performance are well settled! *Dermott v. Jones*, 2 Wal. 1, 7; *Hanger v. Abbott*, 6 Wal. 532, 535-6; *Baylies v. Fettyplace*, 7 Mass. 325. The English cases criticised by counsel hold that parties will be presumed to have contracted with reference to the necessity of obeying the laws of their own country, and performance is for that reason excused where obedience becomes illegal. The doctrine is nowhere more accurately stated and discussed than by Mr. Leake, and we beg to refer the court to the Fourth Edition of Leake, pages 497 and 501 instead of to the edition cited in our brief, p. 31.

2. Appellee says the case of *Gosling v. Higgins*, 1 Campb. 451, is directly in point, which we submit it is not. The excuse for failure to deliver in that case was the act of a foreign government, and such an act, not being the law of the country where the contracting parties reside, is held to be no excuse for failure to perform. Several other cases relied on by Appellee rest on the same well settled principle; *Beebe v. Johnson*, 19 Wend. 500; *Blight v. Page*, 3 Bos. & Pul. 295; *Barker v. Hodgson*, 3 Maule & Selwyn, 271; *Ashmore & Son v. Cox & Co.*, 1 Q. B. (1899) 436. With the last case compare *Nickoll v. Ashton*, 2 K. B. (1901) 126. This distinction is clearly stated and all the important English authorities cited by Mr. Leake.

The case of *Evans v. Hutton*, cited by Appellee (brief, p. 23), does not, we think, bear out what is claimed for it. The contract was to carry goods from England to Canton, China. The excuse for performance pleaded was, that when the goods arrived in the neighborhood of Canton the British Superintendent of Trade in China and the captain of a British vessel prohibited their being landed. The plea was demurred to and the question was whether the plea was sufficient. The argument against it and the decision of the court was, that no *authority* was shown in the Superintendent of Trade. It was by no means held that the plea must show he acted without error. It was held that the plea must show he had authority to act. TINDAL, C J., said: "But it is not stated in these pleas, that any such orders were in fact ever given by His

Majesty in Council, nor are any such orders at all set out." COLTMAN, J., said: "But here there is not in substance any authority stated. It is not said by whom he was authorized." ERSKINE, J., said: "It is properly admitted by my Brother Bompas, that if the plea had shewn an interference by the competent authorities of the country it would have been an answer to the action; but this has not been done." MAULE, J., said: "The case has not been argued on the ground that there is any general prerogative of the Crown for doing that which is alleged to have been done by the Commissioner. He could only have the power so to act by virtue of some order of the Privy Council, and there is no statement in the plea that any order of the Privy Council was ever made."

It is noteworthy that this case has never, we believe, been referred to in the English courts. It is not cited by Mr. Leake or, so far as we can find, by any other text writer. If it is good authority in England today, it is plainly distinguishable, because in this case instead of a "Superintendent of Trade," whose commission had to be issued and whose powers had to be defined by an order in Council, we have the Collector of Customs, an officer whose powers are conferred and defined by an act of Congress. Among those powers is the granting of clearances to ships. Whenever the Collector acts on the subject of clearance of a ship, he acts within his lawful authority, and whether erroneously or not, it is the duty of a ship captain to obey; the Collector stands as the Government; he is for

the time being the law. His act may be erroneous, but within his jurisdiction.

The act of Congress having provided no method of reviewing the Collector's decisions it would seem reasonably to follow that Congress intended them to be obeyed by ships. Appellee says in its brief we might have brought mandamus against the Collector. Are we to be held bound to delay the ship for a law suit? And seeing that the Federal Courts have no jurisdiction of mandamus (*McIntire v. Wood*, 7 Cranch 504; *Bath County v. Amy*, 13 Wall. 244; *Davenport v. County of Dodge*, 105 U. S. 237; *Louisiana v. Jumel*, 107 U. S. 711, 727; *Rosenbaum v. Bauer*, 120 U. S. 450) what court would issue the writ? *Graham v. Norton*, 15 Wall. 427.

3. Appellee insists that the Receivers were bound to foresee that the lead might be stopped by the Collector and make such arrangements that it should not be stopped. The telegrams (pages 18 and 19, Record) show why the carriers hesitated to close and carry out the contract. Baird's telegram of September 22 says, "N. P. Steamship Co. have now declined to handle lead for Yokohama," and Baird's final telegram of September 25 says, "Dodwell, Carlill & Co. have consented to accept the lead already contracted." Dodwell, Carlill & Co. were the agents of the Steamship Company. It is obvious that the fear of the Steamship Company was that its ship and other cargo might be subject to capture by reason of the contraband lead.

Appellee refers to the allegation in the petition (Record p. 3 and 4) that the agent Fitch, "having communicated with the Treasury Department at Washington, D. C., as your petitioner is informed and believes, ascertained that the lead would be allowed to go forward and would not be stopped as contraband, and thereupon entered into the contract to ship the said lead." If the allegation were true or could be considered, it would be an additional reason for saying that the carriers were not bound to apprehend, foresee, or provide against, the Collector stopping the ship. But we submit that all the facts which can be considered are those stated in the stipulation, commencing Record, p. 13. It is shown by the stipulation that the petition was filed by the Trading Company and an answer by the Northern Pacific Railway Company. It was thereupon further ordered that the issues be tried before a jury in the common law branch of the court. But while the petition and answer remain on file, no order framing issues for trial was ever made, and the stipulation says, "in lieu thereof the following is a statement of facts agreed upon by the Northern Pacific Railway Company and by the American Trading Company, upon which the case is submitted to the decision of the court, and trial by jury is hereby waived" (Record, p. 14). This makes the statement of facts the equivalent of a special verdict, and the stipulation must be treated as containing all the facts.

4. Appellee states (brief, p. 32) that the possibility of the shipment being excluded from transportation as contraband had been contemplated by the Receivers and the risk of such interference had been assumed by them, which, we submit, is as a statement of facts not justified by the record, and as a proposition of law, begs one of the main controversies in the case.

5. Nothing in the record warrants the statement in Appellee's brief (p. 33) that the telegram (Record, p. 22) advising the Collector of the ruling of the Department was received at Tacoma within half an hour after the ship sailed.

Nor does the record warrant the statement, at the top of page 34, same brief, that had prompt notice been given of the stoppage of the lead, the shipment might have been sent by San Francisco. No fact is stated in the record to sustain or give color to this statement. It is true no notice of the lead being stopped was given to the plaintiff for six days, but there is no proof in the record that, had it been given earlier, the lead might have been moved to San Francisco in time to arrive at Yokohama so as to fill the terms of their contract of re-sale. There is no testimony showing when ships sailed from San Francisco, or how long it would have taken to carry the lead from Tacoma to Yokohama by any other conveyance than a ship of the Northern Pacific Steamship Company.

6. The sailing time of the ship was up when she commenced to unload the lead; she had passengers and other cargo; she had other bills of lading outstanding and all manner of engagements and obligations, of which this court cannot be advised. We think it wholly inadmissible to say that the law obligated the captain to disregard his passengers and his other cargo, all his other obligations, and remain at the port of Tacoma for an indeterminable time in the hope of getting his clearance to sail with the lead.

7. Appellee suggests a remedy over against the Collector on his bond. We submit there is no such remedy. If his act involves the exercise of any judgment or discretion, he is not liable for error; *Kendall v. Stokes*, 3 How. 87; *Otis v. Watkins*, 9 Cranch, 339; *Crowell v. McFadon*, 8 Cranch, 94; *Otis v. Walter*, 2 Wheat. 18; *Martin v. Mott*, 12 Wheat. 31; *Wilkes v. Dinsman*, 7 How. 89, 132; *Gould v. Hammond*, 1 McAll. 235. There would seem no doubt that the Collector exercises judgment and discretion in issuing a clearance. Acts of Congress forbid the sending out of troops, munitions of war, guns, warships and war implements to a nation at war with a friendly power (R. S. Secs. 5281 to 5291). The Collector, we submit, should refuse a clearance if these acts are being violated, or if the ship is violating any other law of the United States (R. S. Secs. 3987, 4200, 4202, 4205, 4206, 4539, 4573). If so, issuing a clearance involves judgment and discretion.

One of the considerations which led to the adop-

tion of the rule that the act of the government excuses performance of a contract was, the want of any remedy over against the government. The distinction cited from Aleyn's reports by Justice LAWRENCE in the case of *Hadley v. Clarke*, and approved by the Supreme Court of Massachusetts in *Baylies v. Fettyplace*, 7 Mass. 325, 331, was:

> "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and he hath no remedy over, there the law will excuse him; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract."

Was the stoppage of the ship the act of the government or the individual act of the Collector? If the Collector represented the government in what he did, the defendant should be discharged. If he was a naked trespasser and if his act must be regarded as his personal wrong solely, it cannot discharge the defendant.

8. Appellee suggests that the captain should have sailed without a clearance. Not only would that have been a violation of the statute, but it would have involved the ship in other troubles. Probably Japan and China have rules similar to R. S. 4209, and if so it would be impossible to enter the vessel there without her clearance here. And

Abbott on Shipping, 9th Ed. 288-9. Washington Naval Prize Law 24-28, also 29-34.

especially considering the war and liability to search the captain would have been grossly at fault to have sailed with irregular papers.

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for Appellant.